AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY OF GRATUITOUS AGENT FOR NON-FEASANCE. — The defendant, at the plaintiff's request, undertook gratuitously to procure the immediate cancellation of an insurance policy issued by the plaintiff. The defendant directed its local correspondent to investigate the risk with a view to action in the future. The policy remained outstanding, and the plaintiff was obliged to indemnify for a loss. *Held*, that the defendant is liable in tort. *Condon* v. *Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548 (City Court of New York).

For a discussion of the liability of a gratuitous agent for non-feasance, see p. 167 of this issue of the REVIEW.

AGENCY — PRINCIPAL'S RIGHTS AGAINST THIRD PERSONS IN CONTRACTS — EFFECT OF RECEIPT OF USURIOUS COMMISSION BY AGENT. — The plaintiff intrusted $400 to his agent to loan. The agent loaned $350 to the defendant, taking the latter's note for the sum with legal interest, and exacting besides a $50 commission for himself. The principal knew nothing of the commission, nor derived any benefit from it. In a suit on the note, the defendant sets up usury. *Held*, the principal can recover, for in exacting the bonus the agent was not acting within his authority. *Brown* v. *Johnson*, 134 Pac. 590.

The result is not altogether free from difficulties, although in line with the weight of the authorities. *Condit* v. *Baldwin*, 21 N. Y. 219; *Call* v. *Palmer*, 116 U. S. 98. The problem arises whether the transaction is one agreement or two distinct agreements. Now where the principal, or the agent acting within his authority, makes the contract, or where the principal is undisclosed, there is one agreement, and the whole is tainted by usury. *Hall* v. *Maudlin*, 58 Minn. 137, 59 N. W. 985; *Erickson* v. *Bell*, 53 Ia. 627, 6 N. W. 19. So it may be argued the contract is an entirety here. *Security Co.* v. *Hendrickson*, 13 Neb. 157, 12 N. W. 916. See *Condit* v. *Baldwin*, *supra*, 229. If so, the contract is the principal's, and since it is unenforceable for usury, even the sum lent cannot be recovered. *Security Co.* v. *Hendrickson*, *supra*. Or better, the contract fails entirely, not on account of the usury, but because the agent exceeded his authority in making it. See *Bell* v. *Day*, 32 N. Y. 165, 183; *Condit* v. *Baldwin*, *supra*, 230. The principal, under the last construction, should recover his money in an action for money had and received. See *Bell* v. *Day*, *supra*, 179, 183; *Condit* v. *Baldwin*, *supra*, 230. This latter view seems the best practical solution. But as a matter of fact it seems there are two agreements. *Condit* v. *Baldwin*, *supra*. That was the intention of the parties. So the principal case appears logically correct in allowing a recovery on the good contract. Nor is there any difficulty with the consideration, for the loan was paid. No doubt if the principal had received the bonus from the agent, he would be barred on account of his participation in the illegality. *Bliven* v. *Lydecker*, 130 N. Y. 102.

ASSAULT AND BATTERY — CRIMINAL RESPONSIBILITY — SPECIFIC INTENT OF DEFENDANTS ENGAGED IN COMMON ENTERPRISE. — While the defendants were endeavoring to escape apprehension for poaching, one of them shot a gamekeeper. On an indictment for shooting *with intent to murder*, the court charged that both would be guilty if there had been any arrangement between them to resist capture at all costs, or if the nature of the enterprise was such that both must have realized that resistance at all costs was likely to happen. *Held*, that the instructions were correct. *Rex* v. *Pridmore*, 77 J. P. 339 (C. C. A.).

All who embark upon a common unlawful enterprise are responsible for the intended results of their adventure, since each of them is equally a proximate cause of the other's acts. *Rex* v. *Whithorne*, 3 C. & P. 394; *Ferguson* v. *State*, 32 Ga. 658. Even if the results are not intended, no break in the causation relieves the confederates from responsibility so long as the results are foreseeable

from the nature of the common design. *Regina* v. *Salmon*, 14 Cox C. C. 494; *Williams* v. *State*, 81 Ala. 1, 1 So. 179. But where either sudden impulse or preconceived purpose leads one of the number to perpetrate a crime not incidental to the common enterprise, he alone may be held therefor. *Rex* v. *Hawkins*, 3 C. & P. 392; *Rex* v. *Collison*, 4 C. & P. 565. And when, as in the principal case, a specific intent is an element of the crime, the instructions of the trial judge should require a finding that such intent existed in each defendant in order to establish his guilt. *Regina* v. *Bowen*, Car. & M. 149; *State* v. *Taylor*, 70 Vt. 1, 39 Atl. 447. Such requirements would not be satisfied in the principal case by proof that if the bullet had killed instead of wounding the gamekeeper the crime would have been murder, for malice aforethought may be inferred from a felonious course of action, without a positive intention to murder. *Regina* v. *Cruse*, 8 C. & P. 541. The specific intent necessary in the principal case is a positive intention to murder. The instructions given only require a realization that killing may probably ensue, which although sufficient to constitute malice aforethought is not intent to murder.

BAILMENTS — BAILOR AND BAILEE — CONVERSION BY BAILEE — DEVIATION FROM TERMS OF BAILMENT WITHOUT DAMAGE DURING DEVIATION. — The plaintiff, a liveryman, rented a horse and carriage to the defendant to drive from A. to B. The defendant in violation of the terms of the bailment drove beyond B. to C. After returning to B., the horse was killed without fault on the part of the defendant and not as a result of the deviation. *Held*, that the defendant is not liable in trover. *Daugherty* v. *Reveal*, 102 N. E. 381 (Ind. App. Ct.).

In general, to sustain an action for conversion, there must be an exercise of dominion over property inconsistent with, or in repudiation of, the true owner's rights. *Johnson* v. *Farr*, 60 N. H. 426. See *Spooner* v. *Holmes*, 102 Mass. 503. If this exercise of dominion be under an outright claim of ownership, it is of itself a conversion, even if made by mistake. *Hartford Ice Co.* v. *Greenwoods Co.*, 61 Conn. 166, 23 Atl. 91. But if it be the temporary use of another's property, special circumstances of the case should govern the decision. Where damage occurs during an intentional deviation, trover will lie. *Burnard* v. *Haggis*, 14 C. B. N. S. 45; *Perham* v. *Coney*, 117 Mass. 102. *Contra*, *Harvey* v. *Epes*, 12 Grat. 153. But if the deviation be unintentional, even if accompanied by damage, it would not be conversion. *Spooner* v. *Manchester*, 133 Mass. 270. Substantial damage, moreover, is often held an indispensable element in the plaintiff's cause. *Fouldes* v. *Willoughby*, 8 M. & W. 540; *Simmons* v. *Lillystone*, 8 Exch. 431. Thus have the courts taken a common-sense view of this subject, and accordingly it is submitted the principal case is correct in holding technical wrong unconnected with loss insufficient to impose full liability upon the defendant. This seems fairer than the old rule that mere deviation is conversion. *Wheelock* v. *Wheelwright*, 5 Mass. 104. And what modern authority there is, is in accord. *Farkas* v. *Powell*, 86 Ga. 800, 13 S. E. 200; *Doolittle* v. *Shaw*, 92 Ia. 348, 60 N. W. 621. See 8 HARV. L. REV. 280.

BANKRUPTCY — PARTNERSHIP CASES — POWER OF BANKRUPTCY COURT TO ADMINISTER NON-BANKRUPT PARTNER'S ESTATE. — The court of bankruptcy having adjudicated two partners and the bankrupt firm, the trustee petitions that as part of the administration of the firm bankruptcy, the court should be allowed to draw to itself for administration the estate of a third partner, not adjudicated. *Held*, that such order be made. *Francis* v. *McNeal*, 228 U. S. 695, 33 Sup. Ct. 701, affirming 186 Fed. 481 (C. C. A. 3d Cir.).

The Supreme Court settles this controverted point in accordance with the weight of authority of the lower federal courts. *In re Meyer*, 98 Fed. 976